Supreme Court, U.S.
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No. 00-1849

In The

Supreme Court of the United States

JOEL J. KINLOW and TV-49, INCORPORATED,

Petitioners,

v.

CITY OF MILWAUKEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GRANT F. LANGLEY, City Attorney
(Counsel of Record)

RUDOLPH M. KONRAD
Deputy City Attorney
Room 800, City Hall
200 East Wells Street
Milwaukee, WI 53202
(414) 286-2601
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

TABLE OF CONTENTS

Page

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 1

SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION..... 1

42 U.S.C. § 1981..... 1

42 U.S.C. § 1983..... 2

STATEMENT OF THE CASE..... 3

REASONS FOR DENYING THE WRIT 16

I. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURT'S RULING ON THEIR DUE PROCESS CLAIM CONFLICTS WITH ANY PERTINENT DECISION OF THIS COURT..... 16

II. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURTS' RULING ON THEIR EQUAL PROTECTION CLAIM CONFLICTS WITH ANY PERTINENT DECISION OF THIS COURT..... 18

III. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURT'S DECISION ABOUT SUMMARY JUDGMENT RAISES AN IMPORTANT QUESTION INVOLVING THE SEVENTH AMENDMENT..... 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 18, 19

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 21

Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 19

Fidelity & Deposit Co. of Maryland v. United States of America, Through the Use of Lewis E. Smoot, 187 U.S. 315 (1902) 22

Lake Bluff Housing Partners v. City of South Milwaukee, 197 Wis. 2d 157, 540 N.W.2d 189 (1995) 17

Lake Bluff Housing Partners v. City of South Milwaukee, 222 Wis. 2d 222, 588 N.W.2d 45 (Ct. App. 1998) 17

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 17

Parkland Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) 22

Plyler v. Doe, 457 U.S. 202 (1982)..... 19

STATUTES

42 U.S.C. § 1981..... 1, 2, 19

42 U.S.C. § 1983.....2, 3

Wis. Stats. § 62.23(7)(e)(10)..... 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Milwaukee Code of Ordinances, 295-19-8-a 4, 9, 10, 18

Federal Rules of Civil Procedure, Rule 56 22

Federal Rules of Civil Procedure, Rule 56(c) 20, 21

United States Constitution, Amend. VII 1, 21, 22

United States Constitution, Amend. XIV, § 1 1

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 1.

42 U.S.C. § 1981

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined.

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment.

The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

The factual statement supplied by Mr. Kinlow and TV-49 in their Statement of the Case is incomplete. The following is, therefore, provided as a complete statement of all pertinent facts.

In their action, Mr. Kinlow and TV-49 have compared their treatment by the City of Milwaukee to its treatment of other television stations, including Channels 24, 10/36, 58 and 12. The City details below its actions with respect to these other broadcasters and TV-49.

Channel 24

On about December 27, 1974, B & F Broadcasting, Inc., applied for a building permit from the City of Milwaukee for the construction of the Channel 24 television transmission tower at 505 East Capitol Drive, Milwaukee, Wisconsin. Although the December 27, 1974 application refers to certain drawings for the tower, the Department does not maintain records of those drawings.

The December 27, 1974 application includes a subsequently-entered notation referring to a February 21, 1975 letter concerning another tower located at 5431 West Center Street, Milwaukee, Wisconsin. That letter discusses state regulation of the location of antenna systems in relation to streets and public thoroughfares, and not to

existing buildings. The December 27, 1974 application indicates that the related plans were checked on January 17 and January 26, 1975.

By a January 22, 1975 letter, the city plan examiner indicated to the building permit applicant that the proposed tower did not comply with a city ordinance requirement of certain safety devices for persons who would be inspecting the tower. In a February 20, 1975 decision, the City of Milwaukee Standards and Appeals Commission granted a variance to the building code, exempting the applicant from the city safety requirement on condition that the applicant took certain other safety precautions.

By an October 16, 1978 correspondence and Permit Application, B & F Broadcasting, Inc. sought to renew the previous application of December, 1974 to construct the Channel 24 tower; the earlier permit having expired before construction had commenced. The field notes of the building inspector relating to the construction of the Channel 24 tower indicate that the tower's construction was completed on or before September 10, 1979.

Suzanne Hanson was personally involved in the determination that the TV-49 building permit application for a transmission tower did not comply with the then-existing distance requirement of Section 295-19-8-a of the Milwaukee Code of Ordinances. To the best of her knowledge, none of the individuals employed by the City of Milwaukee in 1974 to 1975, and involved in the building permit application process for the Channel 24 tower, were involved in the determination that the TV-49 tower did not comply with Section 295-15-8-a of the Milwaukee Code of Ordinances.

Channel 58

Some twenty years after the process involving Channel 24, Weigel Broadcasting Company in June, 1995 filed a Notice of Appeal and Application for Review with the Board of Zoning Appeals for the City of Milwaukee seeking to place a broadcasting tower, transmitter building, and related facilities at 5215 North Menomonee River Parkway. The Board of Zoning Appeals of the City of Milwaukee conducted a hearing on the merits of the Weigel Broadcasting Company appeal on June 20, 1996.

Weigel Broadcasting Company ("Weigel") was requesting permission to construct a 1,227-foot transmitter tower on Milwaukee County-owned land which required a special use permit rather than a variance. The Board of Zoning Appeals was informed that the Weigel tower had the capacity to hold up to three television antennae owned by Weigel and up to ten antennae owned by Milwaukee County and the capacity for at least three additional full-power antennae from other broadcasters. The Board of Zoning Appeals was also told that Weigel would broadcast on three separate television stations which it owned from this new tower: 1) Channel 58, a local CBS affiliate, 2) Channel 46, "the only full-time Spanish station serving the Milwaukee community," and 3) Channel 65 which was described as providing "financial programming seven hours per day during the week and a variety of non-English programs with over a dozen different languages as well as religious and social programming directed at predominantly African-American congregations."

The Board of Zoning Appeals was further informed that prior to the hearing Weigel had "attempted to rent space on existing towers, contact[ing] every other tower owner in the community [and] no tower owner was willing to make space available." The Board of Zoning Appeals was also provided with expert analysis indicating that potentially harmful ice falling from this tower was not likely to travel more than several hundred feet from its base and that it was ideally located in a parkway in an urban area "so as to minimize the potential for property damage or personal injury."

Subsequent to the hearing on June 20, 1996, the Board of Zoning Appeals of the City of Milwaukee issued a written decision addressing Weigel's request for a special use permit and variance. In granting the requested special use permit and variance, the Board of Zoning Appeals subjected Weigel to certain conditions, including that Weigel "make the tower available for the attachment of at least three (3) additional full power television broadcasting antennae."

Transmission Tower Policy Statement

On March 21, 1997, the Common Council of the City of Milwaukee passed a resolution entitled "Substitute resolution approving a 'Transmission Tower Policy Statement' as part of the comprehensive plan of the City of Milwaukee." (City of Milwaukee, Office of the City Clerk, Certified Copy of Resolution, File No. 961537, pp. 1-4). In passing this resolution, the City of Milwaukee Common Council explained the need for such a step in part by

stating that, "[t]he current rapid proliferation of transmission towers, particularly those used for cellular telephone services and personal communications systems, makes it imperative that the City adopt a policy regarding the placement of such towers which protects Milwaukee residents and neighborhoods without imposing unreasonable burdens on the owners, operators and users of such facilities. . . . " *Id.*, p. 1. In adopting this resolution, the Common Council further explained its intention as follows: "A formally adopted policy on the placement of transmission towers can serve as a reference tool and guide for the Board of Zoning Appeals, the City Plan Commission, City Building and Zoning staff, and other City bodies and officials responsible for making decisions about the placement of transmission towers in the City of Milwaukee. . . . " *Id.*

Within the statement of the policy itself, the Common Council explained that:

> Transmission towers generally come in two varieties – those that support TV and radio reception/transmission systems ("RTS"), and those that support personal communications systems, cellular communications facilities, personal wireless services and similar facilities ("PWS"). The former are usually very tall (often over 1,000 feet in height) and relatively few in number. The latter are relatively short (100-200 feet in height) but are becoming quite numerous. The policy statements apply to either or both tower types as noted.

Id., pp. 2-3. With respect to both RTS towers and PWS towers, the Transmission Tower Policy Statement further provided as follows:

> As advances in technology render it feasible to improve overall communications while reducing the total number of transmission towers, it is the policy of the City to strongly encourage the design of such towers to accommodate multiple users in order not only to reduce the proliferation of such towers, but also to secure a reduction in the total number of towers. To the extent that transmission towers can hold multiple reception/transmission ("R/T") systems, tower proponents should be strongly encouraged to make every effort to locate their R/T systems on existing structures. *Applicants for new transmission towers should be encouraged to design such facilities to accommodate Multiple R/T systems and associated equipment in order to fulfill the City's policy of reducing the total number of towers over time.* At a minimum, RTS towers for TV and/or radio facilities should be designed to support at least three R/T systems having similar power.

Id., p. 3 (emphasis supplied). The City's Transmission Tower Policy Statement of March 21, 1997 further provides the following as to RTS towers:

> Accomplishment of the policy objective providing for coordinated usage of transmission towers should lead to a reduction in the total number of such towers within the City through consolidation. It is the policy of the City to strongly encourage such consolidation in order not only to reduce potential proliferation of transmission towers, but also to secure a net reduction in the total number of transmission towers. . . . Applicants for the approval of new towers who are able to demonstrate that the construction of such new towers will eventually result in the removal of one or more existing

> towers should be presumably deemed to have demonstrated that such towers will indeed fulfill the policy objective providing for consolidation of transmission towers.

Id. at pp. 3-4.

Channel 49

On or about May 19, 1997, the plaintiff, Joel J. Kinlow, filed a Notice of Appeal and Application for Review with the Board of Zoning Appeals for the City of Milwaukee relating to property located at 4872 North Fratney Street. He indicated that the property at that time was not in use and he proposed to place a tower on that site.

On May 16, 1997, Attorney Milton G. Emmerson, on behalf of Joel J. Kinlow, wrote the Board of Zoning Appeals requesting a variance for the previously-mentioned property so that Mr. Kinlow's television station could "erect a transmitter tower on the subject property to enhance the reception of channel 49." As reflected in that correspondence, the then-applicable section of the Milwaukee Code of Ordinances provided that, " '[n]o structure other than related accessory structures shall be located within a circle having the transmitter tower as its center and a radius equal to 20% of the height of the tower or 100 feet whichever is greater.' " *Id.*, quoting sec. 295-19-8-a, Milwaukee Code of Ordinances ("MCO").

Mr. Kinlow proposed constructing a 1,053-foot tall transmitter tower at the subject property. At the time of the application, Mr. Kinlow's television station had a "transmitter tower . . . located in Oak Creek, Wisconsin."

On June 5, 1997, a zoning specialist of the Department of Building Inspection of the City of Milwaukee wrote to Mr. Kinlow, advising him that "the distance between the proposed tower and the existing buildings does not meet the dimensions that are required by the Zoning Code" and that he would first have to "obtain a variance to proceed with [his] project." In referring to the applicable Zoning Code section, that is, sec. 295-19-8-a, the zoning specialist advised Mr. Kinlow that, "there appears to be 4 buildings located within 210.6 feet of the proposed tower [that is, within 20% of the height of the tower]" and that "one building is located within 4.66 feet of this tower."

Although Mr. Kinlow's counsel represented in his submission to the Board of Zoning Appeals that "Mr. Kinlow has been told by owners of the adjoining properties that they do not object to locating a transmitter tower at the proposed site," the Board of Zoning Appeals received an affidavit objecting to the requested variance from an individual who represented that he was the owner of a property "less tha[n] 100' away from" Mr. Kinlow's property, that this nearby property owner had been at that location "for more than thirty (30) years," that he objected to the tower for various reasons, and that he had not been contacted by Mr. Kinlow before notice of the hearing before the Board of Zoning Appeals had been issued.

The Board of Zoning Appeals also received a facsimile transmission from a property owner whose land "abuts the [subject] property on the east border" and who objected to the requested variance for various reasons,

including safety and health reasons related to the objector's tenants at his property

The Board of Zoning Appeals conducted a hearing on Mr. Kinlow's variance request on July 31, 1997. A representative of the Department of City Development appeared at the hearing to object to Mr. Kinlow's request for a variance for several reasons including: 1) That Mr. Kinlow's request was contrary to the City's previously-passed tower policy statement in that Mr. Kinlow's station's antennae could have been placed on another already-existing tower; and, 2) that the proposed tower would only be 151 feet away from an apartment and other residences and perhaps a shorter distance than that away from a Pick-N-Save supermarket with many pedestrians and that ice could fall from the tower.

Counsel for Mr. Kinlow at the hearing before the Board of Zoning Appeals contended that the variance should be granted in part because Mr. Kinlow had suffered a hardship in this matter as he had already paid more than $200,000 to purchase the subject property and had been told by a representative of the City prior to that purchase that he would not need any variance from applicable distance requirements. Counsel for Mr. Kinlow 1) admitted that he could not represent to the Board of Zoning Appeals that the offer to purchase contained any type of contingency relating to variances or special use permits, 2) did not contest that such a contingency had either been waived or never been included because the purchase had gone forward before a building permit had been issued, 3) admitted that there was no written communication from anyone on behalf of the City confirming that no variance or special use exemption would be

required, and 4) conceded that Mr. Kinlow had apparently proceeded only on the word of this City employee.

When asked about the City's Transmission Tower Policy Statement at the hearing before the Board of Zoning Appeals, Mr. Kinlow indicated that he had attempted to mount his antennae on other already-existing antennas, and had not been able to do so at Channels 12, 6 or 4, that MATC did not have their plan together for their multi-user tower at a time during which the FCC would allow Mr. Kinlow to move his tower, and that Channel 58's multi-user tower was also not an option at the time of Kinlow's FCC application because it did not exist, although it did exist at the time of Kinlow's Board of Zoning Appeals hearing. At no time during his presentation, did Mr. Kinlow ever indicate that his proposed transmission tower could or would provide facilities for anything more than one television station.

In deliberating on the matter, the Chairman of the Board of Zoning Appeals indicated that he had concluded that Mr. Kinlow's application was inconsistent with the City's Transmission Tower Policy Statement and that Mr. Kinlow had not met any of the ordinance criteria for the grant of a variance. One other Board member in moving to deny the variance indicated that while Mr. Kinlow might have met one of the criteria, he had not, as required, met all of the criteria. The Board then voted unanimously to deny the variance request.

The Board of Zoning Appeals issued its decision denying the requested variance on August 13, 1997. Following the decision of the Board of Zoning Appeals, the plaintiff, Joel J. Kinlow, pursuant to Wis. Stats.

§ 62.23(7)(e)(10), sought judicial review of the decision of the Board of Zoning Appeals with a summons and complaint filed in the Milwaukee County Circuit Court in an action against the Board of Zoning Appeals. On December 23, 1998, Milwaukee County Circuit Court Judge Victor Manian issued a decision in the aforementioned lawsuit affirming the decision of the Board of Zoning Appeals of the City of Milwaukee.

Channels 10/36

On November 20, 1997, the Board of Zoning Appeals of the City of Milwaukee conducted a hearing into a request by the Milwaukee Area Technical and Adult Education District for a special use permit to construct a 1,221 foot high transmitter tower at 4350 North Humboldt Avenue. Prior to the hearing before the Board of Zoning Appeals, the City Plan Commission had "determined that the proposed use would not have an adverse impact provided [that MATC] continues to aggressively market the tower for multiple antennae usage [and that] the tower is built with a capacity for nine stations. . . . " A representative of the City of Milwaukee indicated at the Board of Zoning Appeals hearing relating to the MATC tower that MATC's tower had the capacity for up to 100 stations, including 14 FM signals and further indicated that the City felt that MATC met the intent of the City's transmission tower policy.

MATC presented technical testimony to the Board of Zoning Appeals indicating that its tower would permit a number of broadcasters all to be "top-mounted" and

would provide the necessary television transmission service without distortion or loss of signal for a number of broadcasters. The Board of Zoning Appeals received technical testimony indicating that the MATC tower would have a "star mount" on the top of the antenna allowing for mounting of up to nine antennas on the top, rather than on the side of the structure.

The Board of Zoning Appeals was provided with testimony that MATC already had arrangements for one radio station to be mounted on their tower and that other television stations would in the near future also enter into agreements with them for mounting on the tower.

At the conclusion of the hearing, the members of the Board of Zoning Appeals voted to approve MATC's request, explaining in part that their decision was based upon MATC's ability to mount a number of users on its tower.

Channel 12

On or about July 31, 1997, the WISN division of the Hearst Corporation filed a Notice of Appeal and Application for Review with the Board of Zoning Appeals of the City of Milwaukee to construct a 116 foot extension to the height of an existing television transmitter tower located at 5215 Milwaukee River Parkway. A diagram of the tower with the extension indicates that the extension provided only an insignificant modification to an already existing television transmission tower. The WISN tower is located quite close to the tower constructed by Weigel.

On or about October 16, 1997, and in a revised correspondence dated January 6, 1998, the Department of Building Inspection of the City of Milwaukee advised WISN that the proposed 116 foot addition to the existing 1,103 foot transmitter would require the grant of a special use permit. The WISN tower is located generally in an area within or adjacent to Lincoln Park.

In a second revised plan of operation presented to the Board of Zoning Appeals, WISN indicated that it was seeking only to add 115 rather than 116 feet to its existing tower and that it was seeking this addition to "broadcast the best DTV signal to the largest audience. . . . " The WISN tower was initially constructed in 1954-5 and, while located in a two-family residential district, the City of Milwaukee then permitted such a use in residential districts.

The Board of Zoning Appeals was provided with various expert analyses indicating that the television transmission service sought by WISN could be provided either by the MATC tower or the Weigel tower. The Board of Zoning Appeals received a petition indicating that a large number of area residents supported the extension of the Channel 12 tower.

Following a Board of Zoning Appeals hearing on WISN's request on July 29, 1999, the Board of Zoning Appeals issued a decision dated August 27, 1999 denying the request for the 115 foot addition to the existing transmitter tower. In reaching its conclusion, the Board of Zoning Appeals stated in part:

> The testimony and the record fail to demonstrate that the proposed DTV antenna could not

> reasonably be located at a different location and still meet the public convenience. There was no evidence provided that the applicant made any effort to acknowledge or conform to the City's goal and purposes in adopting the Tower Policy. There was no evidence presented to show that the applicant made any effort to attempt to consolidate its antenna on another tower or that applicant's proposed tower extension furthers the Tower Policy objective of coordinated usage.

WISN has filed an appeal of the Board of Zoning Appeals' decision in the Circuit Court for Milwaukee County.

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURT'S RULING ON THEIR DUE PROCESS CLAIM CONFLICTS WITH ANY PERTINENT DECISION OF THIS COURT

In stating their case for granting the writ as to their due process claim, the petitioners have not demonstrated that the decision of the Seventh Circuit Court of Appeals conflicts in any way with the decision of another United States Court of Appeals or any State court of last resort or has greatly departed from the accepted or usual course of judicial proceedings. Petitioners have also not argued that the decision of the Seventh Circuit Court of Appeals has decided any issue with respect to their due process claim that has not previously been settled by this court. To the extent that they have attempted to state any case for the grant of this portion of their petition, they appear

to be contending that the lower courts erred in granting summary judgment on their due process claim because the lower courts ignored a property interest possessed by petitioners. That contention is fatally flawed because the petitioners, as a matter of law, had no property right under Wisconsin law.

As the petitioners themselves acknowledge, this Court recently reaffirmed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) that, "[t]he hallmark of property, the Court emphasized, is an individual entitlement *grounded in state law* which cannot be removed except 'for cause' " (emphasis supplied) (citations omitted). The petitioners are attempting to stretch one city plan examiner's statements about the proposed site for the tower into some type of property right under Wisconsin law. Their contention, however, simply does not comport with that law.

Under the law of Wisconsin, " 'a building permit grants no rights to an unlawful use.' " *Lake Bluff Housing Partners v. City of South Milwaukee*, 222 Wis. 2d 222, 227, 588 N.W.2d 45 (Ct. App. 1998), quoting *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 180, 540 N.W.2d 189 (1995). "[I]t is settled in Wisconsin that construction in violation of a zoning classification is unlawful – even when construction is authorized by a building permit issued voluntarily by the appropriate authorities." *Lake Bluff*, 222 Wis. 2d at 228.

The plan examiner, did not, ultimately, provide any building permit to the petitioners. Even if he had done that, however, the petitioners would not have had any property right under Wisconsin law to construct the proposed television tower at the site that they had selected

because it would have been illegal, given the requirements of sec. 295-19-8-a of the Milwaukee Code of Ordinances.

The district court concluded that the petitioners "have made no showing that they had a property right to this permit under Wisconsin law." App. 20. The lower courts correctly concluded, consistent with this Court's rulings, that summary judgment should be granted as to the petitioners' due process claim.

II. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURTS' RULING ON THEIR EQUAL PROTECTION CLAIM CONFLICTS WITH ANY PERTINENT DECISION OF THIS COURT

Once again with regard to any claim for a violation of their equal protection rights, the petitioners can only be contending that the lower courts erred with respect to summary judgment because their decisions conflict with a relevant decision of this Court. They have again utterly failed to make out their contention on this point.

With respect to this claim, the petitioners cite to *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) without any argument or explanation whatsoever. Petition, p. 9. This Court's decision in *Arlington Heights* does not, alone, demonstrate that the lower courts in this matter reached any decision on the petitioners' equal protection claim that conflicted with the pertinent decision of this Court.

The lower courts concluded that the petitioners could not, as a matter of law, maintain an equal protection claim because they had adduced no evidence whatsoever that

similarly situated members of an unprotected class had been treated more favorably than had the petitioners. App. pp. 9-12, 23, n.2 (discussing that claim within the context of the petitioners' assertions under 42 U.S.C. § 1981). This Court's decision in *Arlington Heights* does not address the issue that was viewed by the lower courts as the lynchpin for their analysis.

This Court has, on other occasions, made clear that, "[t]he Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982). As noted by the court of appeals below, the petitioners cannot show that television station operators who may have been in the unprotected class were treated more favorably. App. pp. 9-11. These other television station operators either obtained the permission to build their towers before passage of the Transmission Tower policy Statement (Channels 58 and 24), or agreed to build a tower that complied with that Statement (Channels 10-36), or sought approval from entirely different decision-makers employed decades-apart by the City (Channel 24). App. pp. 9-11. In accord with the directions of this Court, the lower courts evaluated and correctly concluded that the petitioners could not establish that any of the other broadcasters who received permits [and were thus more favorably treated] were actually similarly situated.

Petitioners attempt to make much of the inadvertent reference by the court of appeals at one place to the Transmission Tower Policy Statement as an "ordinance."

Petition, p. 6 and App. p. 5. The error, however unfortunate, is irrelevant to the analysis of the merits of the Petition and immaterial to the outcome reached by the appeals court below. The opinion of the court of appeals correctly reflects that it understood that the Statement, though not binding on the Board of Zoning Appeals, was nonetheless intended to direct its deliberations and properly did so. App. pp. 5 ("the 'Transmission Tower Policy Statement' provides that the 'policy on the placement of transmission towers can serve as a reference tool and guide for the Board of Zoning Appeals . . . for making decisions about the placement of transmission towers in the City of Milwaukee' ") and 7 ("the Board concluded that Mr. Kinlow's proposed tower did not comply with the 'Tower Policy Statement' "). The court of appeals also correctly understood that while the Transmission Tower Policy Statement was not binding on the Board, its existence as a " 'reference tool and guide for the Board of Zoning Appeals' " served to distinguish petitioners' request for a building permit substantively from the request of other transmission tower owners whose requests either preceded the statement or complied with it or the subsequent ordinance. App. p. 5.

The lower courts' decisions are consistent with the rules of civil procedure and this Court's interpretation and application of them with respect to summary judgment motions. Fed.R.Civ.P. 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law." As this Court has explained, "[i]n our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In the present action, the lower courts correctly followed the dictates of the civil procedure rule and this Court's decision in concluding that the petitioners had failed to make a sufficient showing with respect to the issue of more favorable treatment of similarly situated members of an unprotected class. There simply is no basis, therefore, for granting the requested writ with respect to petitioners' equal protection claim.

III. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURTS' DECISION ABOUT SUMMARY JUDGMENT RAISES AN IMPORTANT QUESTION INVOLVING THE SEVENTH AMENDMENT

While the petitioners have contended that granting summary judgment to the City in this case has violated their right to a jury trial under the Seventh Amendment, they have not described in any fashion the precise manner in which the grant of summary judgment violated that right. This Court has long ago established that the proper application of summary judgment procedures does not violate a losing party's Seventh Amendment right to a jury trial. No showing has been made that the application in this case with respect to the single issue of the dissimilarity of permitees in the unprotected class

raises in any fashion an important constitutional question involving the Seventh Amendment.

While the petitioners have provided an extensive discussion of the policy standards for granting summary judgment under Rule 56 and the potential for conflict between its application and the rights protected by the Seventh Amendment, they have done nothing to show that any particular conflict has occurred in this case. As is clear from the preceding discussion in this Reply, the sole issue resolved on summary judgment below was the question of whether any of the successful permit applicants in the unprotected class were, in fact, similarly situated to the petitioners. Ample evidence was presented below establishing that the successful applicants were not similarly situated. The petitioners provided no evidence whatsoever establishing that the other applicants were, in fact, similarly situated, with the exception of Channel 24, which received its permit from entirely different decision-makers. There was simply no competing evidence through which a jury should sift in order to make a determination about this issue. The petitioners have failed to demonstrate that the potential for conflict between the Seventh Amendment and the summary judgment rule in fact did occur in this case, much less, that this Court needs to address that potential conflict here.

This Court long ago established that the proper application of summary judgment procedures does not result in the violation of the Seventh Amendment right of the losing party. *Fidelity & Deposit Co. of Maryland v. United States of America Through the Use of Lewis E. Smoot*, 187 U.S. 315, 319-20 (1902). *See also Parkland Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979). There has been

nothing in this case but the proper application of summary judgment to the issue presented to the lower courts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

Dated this 12th day of July, 2001.

Respectfully submitted

GRANT F. LANGLEY
City Attorney
Counsel of Record

RUDOLPH M. KONRAD
Deputy City Attorney
Attorneys for Respondent

P.O. ADDRESS:

800 City Hall
200 East Wells Street
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8550